

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

Inquiry by the Department of Telecommunications)
and Energy pursuant to Section 271 of the)
Telecommunications Act of 1996 into the)
Compliance Filing of New England Telephone)
and Telegraph Company d/b/a Bell)
Atlantic-Massachusetts as part of its application)
to the Federal Communications Commission)
for entry into the in-region interLATA)
(long distance) telephone market.)

D.T.E. 99-271

HEARING OFFICER RULING ON MOTION FOR CONFIDENTIAL TREATMENT

November 7, 2002

I. INTRODUCTION

In our Order Adopting Performance Assurance Plan, D.T.E. 99-271, at 32-33 (September 5, 2000), the Department of Telecommunications and Energy ("Department") established a requirement that Verizon New England Inc. d/b/a Verizon Massachusetts' ("Verizon") data generation and performance reporting under the Performance Assurance Plan ("PAP") be audited on an annual basis. On September 24, 2002, Verizon entered into an engagement with PricewaterhouseCoopers LLP ("PwC") for an audit of the PAP. On November 7, 2002, PwC filed a Motion of PricewaterhouseCoopers LLP for Confidential Treatment and Memorandum in Support of Motion of PricewaterhouseCoopers LLP for Confidential Treatment ("Memorandum"). This Hearing Officer Ruling addresses that motion, and defines the protective treatment to be afforded materials provided to the Department during the PAP audit.

II. STANDARD OF REVIEW

Information filed with the Department may be protected from public disclosure pursuant to G.L. c. 25, § 5D, which states in part that:

The [D]epartment may protect from public disclosure, trade secrets, confidential, competitively sensitive or other proprietary information provided in the course of proceedings conducted pursuant to this chapter. There shall be a presumption that the information for which such protection is sought is public information and the burden shall be upon the proponent of such protection to prove

the need for such protection. Where such a need has been found to exist, the Department shall protect only so much of the information as is necessary to meet such need.

G.L. c. 25, § 5D permits the Department, in certain narrowly defined circumstances, to grant exemptions from the general statutory mandate that all documents and data received by an agency of the Commonwealth are to be viewed as public records and, therefore, are to be made available for public review. See G.L. c. 66, § 10; G.L. c. 4, § 7, cl. twenty-sixth. Specifically, G.L. c. 25, § 5D, is an exemption recognized by G.L. c. 4, § 7, cl. twenty-sixth (a) ("specifically or by necessary implication exempted from disclosure by statute").

G.L. c. 25, § 5D establishes a three-part standard for determining whether, and to what extent, information filed by a party in the course of a Department proceeding may be protected from public disclosure. First, the information for which protection is sought must constitute "trade secrets, [or] confidential, competitively sensitive or other proprietary information;" second, the party seeking protection must overcome the G.L. c. 66, § 10, statutory presumption that all such information is public information by "proving" the need for its non-disclosure; and third, even where a party proves such need, the Department may protect only so much of that information as is necessary to meet the established need and may limit the term or length of time such protection will be in effect. See G.L. c. 25, § 5D.

Previous Department applications of the standard set forth in G.L. c. 25, § 5D reflect the narrow scope of this exemption. See Boston Edison Company: Private Fuel Storage Limited Liability Corporation, D.P.U. 96-113, at 4, Hearing Officer Ruling (March 18, 1997) (exemption denied with respect to the terms and conditions of the requesting party's Limited Liability Company Agreement, notwithstanding requesting party's assertion that such terms were competitively sensitive); see also, Standard of Review for Electric Contracts, D.P.U. 96-39, at 2, Letter Order (August 30, 1996) (Department will grant exemption for electricity contract prices, but "[p]roponents will face a more difficult task of overcoming the statutory presumption against the disclosure of other [contract] terms, such as the identity of the customer"); Colonial Gas Company, D.P.U. 96-18, at 4 (1996) (all requests for exemption of terms and conditions of gas supply contracts from public disclosure denied, except for those terms pertaining to pricing).

All parties are reminded that requests for protective treatment have not and will not be granted automatically by the Department. A party's willingness to enter into a non-disclosure agreement with other parties does not resolve the question of whether the response, once it becomes a public record in one of our proceedings, should be granted protective treatment. In short, what parties may agree to share and the terms of that sharing are not dispositive of the Department's scope of action under G.L. c. 25, § 5D, or c. 66, § 10. See Boston Edison Company, D.T.E. 97-95, Interlocutory Order on (1) Motion for Order on Burden of Proof,

(2) Proposed Nondisclosure Agreement, and (3) Requests for Protective Treatment (July 2, 1998).

III. DESCRIPTION OF THE MOTION

PwC requests confidential treatment of certain data and documents developed and prepared by PwC in connection with the Department's audit of Verizon (Memorandum at 1). PwC divides these documents into four categories, and seeks protection for each category: (1) PwC Work Program; (2) periodic status reports to the Department and Verizon prepared by PwC; (3) PwC supporting work papers; and (4) draft examination report prepared by PwC (*id.* at 2).

IV. DISCUSSION

In an unusual procedural step, PwC asks for protection of categories of information not yet filed with the Department. In the interest of administrative efficiency, the Department chooses to address confidentiality at this time, so that repeated requests for confidentiality do not impede the progress of the audit. The Hearing Officer notes that this digression from standard Department practice is limited to the particular needs of the PAP audit, and should not be construed as a change in Department policy.

A. PwC Work Program

PwC states that its Work Program, which outlines specific steps in the audit, will identify in detail PwC's methods, practices and procedures for conducting the audit (*id.*). PwC argues that the Department has granted confidential treatment to Verizon's methods and procedures (*id.* at 3). In addition, PwC contends that the information in the Work Program is unique to PwC, cannot be readily duplicated, and that publicly revealing this commercial work product would give competitors an unfair advantage (*id.*).

The Hearing Officer agrees that information regarding PwC's methods, practices and procedures for conducting the audit, as defined in PwC's Work Program, is the type of information that the Department has protected in the past. See MediaOne/Bell Atlantic Arbitration, D.T.E. 99-42/43, 99-52, at 51 (March 24, 2000); Tel-Save, Inc., Hearing Officer Rulings on Bell Atlantic's Motion for Confidential Treatment at 6 (October 22, 1998). Furthermore, revealing PwC's commercially sensitive work product would provide competitors with an unfair competitive advantage. See Boston Gas Company, D.P.U. 96-50, Hearing Officers' Ruling on the Motion of Boston Gas Company for Confidentiality (November 13, 1996) (protecting models and databases belonging to third-party consultants). Therefore, the Hearing Officer finds that PwC's Work Program meets the statutory standard for competitively sensitive materials to be protected under §5D, and grants confidential treatment to that

document.

B. Periodic Status Reports to the Department and Verizon prepared by PwC

PwC argues that it will provide periodic status reports to Verizon and the Department which will detail the progress of the audit and report preliminary observations (id.). PwC states that these status reports will contain information relating to Verizon's proprietary methods and procedures, and underlying transaction data including customer-specific and carrier-specific data (id.).

PwC contends that the information on methods and procedures to be included in the status reports is the type of information that the Department has protected in the past (id. at 4). In addition, PwC maintains that the Department has protected carrier-specific performance data in other proceedings (id.). PwC also argues that the observations in the status reports will be preliminary and will not be reflective of the completed audit test procedures, and that granting confidential treatment is necessary to enhance the candor of the information shared during the audit process (id.).

The Hearing Officer agrees that the Department has protected internal methods and procedures in the past (see Section IV.A., above), and currently protects customer-specific and carrier-specific performance data. See Consolidated Arbitrations, D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94 - Phase 4-Q at 17-18 (2000) (customer-specific information); Consolidated Arbitrations, D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94, Hearing Officer Ruling on Bell Atlantic Motion for Protective Treatment of Performance Standards Reports (October 21, 1999) (carrier-specific information); Tariff Nos. 14 and 17, D.T.E. 98-57, Hearing Officer Ruling on Motion for Confidential Treatment by Bell-Atlantic Massachusetts (November 5, 1999) (carrier-specific information). The Hearing Officer also agrees that it is appropriate to protect the underlying specific transaction data. While enhancing the candor of the audit process may not be sufficient grounds to grant confidential treatment under §5D, the Hearing Officer finds that PwC has advanced sufficient other grounds to grant confidential treatment. Therefore, the Hearing Officer hereby grants confidential treatment to PwC's periodic status reports submitted to the Department during this audit.

C. PwC Supporting Work Papers

PwC states that it will prepare and provide exclusively to the Department detailed, supporting work papers, that will reflect the Work Program developed for this audit, and will provide a blueprint of the internal business practices developed and utilized by PwC (id. at 5). PwC argues that the Department should protect the work papers for the same reasons that it should protect PwC's Work Program (id.). PwC contends that it maintains confidentiality of work papers in accordance with its professional duties and business interests (id.). In addition,

PwC argues that the work papers will contain data proprietary to Verizon and other carriers, Verizon's internal methods and procedures, and information the disclosure of which would put PwC at an unfair competitive disadvantage (id.).

PwC represents that the information in the work papers will be the same type of information as that in the Work Program. The Hearing Officer has granted confidential treatment to the information contained in the Work Program above, and for the same reasons hereby grants confidential treatment to PwC's work papers provided to the Department during the course of this audit.

D. Draft Examination Report Prepared by PwC

PwC argues that the draft examination report will contain observations that are not conclusive, and protection of these preliminary results will enhance the candor of the information contained (id. at 5-6). In addition, PwC contends that the draft report will contain competitively sensitive data of Verizon, carriers, and customers, and is included in the draft report to provide insight into PwC's preliminary audit results (id.). PwC states that the final examination report will be filed as a public document (id.).

The Hearing Officer finds that the carrier-specific nature of the information to be included in the draft examination report makes it appropriate for protection under §5D. As noted above, the Department currently protects carrier-specific performance data. See Section IV.B., above. In addition, the draft examination report is a preliminary document, and the final examination report will be made available to the public. Therefore, the Hearing Officer finds that the draft examination report falls within the category of documents for which confidential treatment is appropriate, and hereby grants confidential treatment to the draft examination report.

V. RULING

The Hearing Officer grants PwC's motion for confidential treatment of (1) the PwC Work Program; (2) periodic status reports to the Department and Verizon prepared by PwC; (3) PwC's supporting work papers; and (4) the draft examination report prepared by PwC.

November 7, 2002
Date

_____/s/_____
Joan Foster Evans
Hearing Officer

cc: Mary L. Cottrell, Secretary
Paul G. Afonso, General Counsel
William Agee, Assistant General Counsel
Michael Isenberg, Director, Telecommunications Division
Service List